

**COURT OF COMMON PLEAS
FOR THE STATE OF DELAWARE**
WILMINGTON, DELAWARE 19801

John K. Welch
Judge

July 14, 2009

Ms Deborah Napier
806 Market Street
Marcus Hook, PA 19061
Plaintiff Below,
Pro-Se Appellant

Ms. Mary Roth
416 Sterling Avenue
New Castle, DE 19720
Defendant Below,
Pro-Se Appellee

Re: *Deborah Napier v. Mary Roth*
C.A. No. 08-06-111

Date Submitted: June 23, 2009
Date Decided: July 14, 2009

MEMORANDUM OPINION

Dear Ms. Napier and Ms. Roth:

Trial in the above captioned matter took place on June 23, 2009 in the Court of Common Pleas, New Castle County, State of Delaware. Following the receipt of documentary evidence¹ and sworn testimony, the Court reserved decision. This is the Court's Final Decision and Order.

¹ The Court received into evidence the following items: Plaintiff's Exhibit # 1 – Letter from Roth to Napier dated June 9, 2007 in which it asks Napier to assist in speaking with Melissa Napier and Virgilio Fana regarding money owed to Roth by Melissa Napier and Virgilio Fana; Plaintiff's Exhibit # 2 – Letter from Roth to Napier dated October 19, 2007, with return receipt label removed from envelope, in which Roth informed Napier that the property needed to be removed from Roth's garage by December 1, 2007, in which Virgilio Fana and Melissa Napier never responded to Roth's requests to retrieve the property and Napier can have what she wants of the property when she retrieves her property from Roth, in which after December 1, 2007, all of the property will be disposed of if not retrieved; Plaintiff's Exhibit # 3 – Photographs dated September 2006, November 2006, Christmas 2006 and Easter 2007 (3A through 3K) of the children wearing clothing, depicting children's toys and the two (2) young female children wearing the identical coats dated November 2006; Plaintiff's Exhibit # 4 – Telephone bill from Verizon for telephone number 610-485-0634 with the billing date of February 15, 2008 with a circled call placed on Wednesday, February 6, 2008 at 8:32PM to telephone number 302-325-1259 in New Castle, Delaware for 1.1 minutes; Plaintiff's Exhibit # 5 – An undated, notarized letter from Grace Roth addressed to "Whom It May Concern" in which she witnessed Napier make a telephone call in her home to Roth in the last week of June

I. Procedural Posture.

This is an *appeal de novo* brought pursuant to the Court of Common Pleas under 10 *Del. C.* §9570 *et. seq.* from the Magistrate's Court. Plaintiff has timely perfected her appeal and Defendant has answered the Complaint.

The instant action is a replevin action for which Plaintiff claims Defendant failed to return property to the Plaintiff as requested and disposed of the property without Plaintiff's knowledge and consent.

Plaintiff requests that this Court award the total value of the property in the amount of \$3,756.00.

2007 and leave a message on the answering machine for Roth and in which she witnessed a second telephone call from Napier to Roth placed in the first week of July 2007; Plaintiff's Exhibit # 6 – Notarized letter, dated May 19, 2008 by the Notary, from Melissa Napier to "Whom It Concerns" in which Melissa Napier grants ownership to Napier for belongings at Roth's home, including a folding crib, a 27-inch TV with DVD/VCR combination, two (2) potty seats and eight to ten (8-10) DVDs; Plaintiff's Exhibit # 7 – Itemized list of property with accompanying value and receipts, including children's toys, a television, games, dolls, DVDs and a CD for computer – listed according to the length of time the children possessed the items, One-month: games, dolls, DVD, CD for computer; Four-to-six months: toys, books, children's clothing purchased including raincoats, dresses, pajamas, shirts, pants, hoodies, skirts, jeans, hats, coats, shoes and sweaters, playhouse, bouncing chair and movies; Receipts with dates that range from November 25, 2005 to February 6, 2007 from various stores including Wal-Mart, Toys 'R' Us, K&B Toy Stores, Hess, Linens 'N Things, Kmart, JcPenney's, Target, Forman Mills and Value City; Plaintiff's Exhibit # 8 – Copy of Page 1 of Justice of the Peace Court No. 12's Opinion and Order from May 23, 2008 and Copy of Roth's Answer to Complaint with Napier's Responses written in; Envelope with return receipt label missing. Defendant's Exhibit # 1 – Letter from Roth to Napier sent Return Receipt (Exhibit is the same as Plaintiff's Exhibit # 2); Defendant's Exhibit # 2 – Copy of Page 1 of Justice of the Peace Court No. 12's Opinion and Order with "On 8-10-07, Order from Family Court, Judge Chapman gave temporary custody to the children's father" underlined; Defendant's Exhibit # 3 – Letter from Roth to Virgilio Fana sent Certified Mail and sent Return Receipt dated 7-16-07, in which it states Roth not being able to see the children and Fana needed to pick up the children's belongings, told several times he would come to pick up the belongings, asked Fana to make arrangements to pick up the belongings, Roth did not want to dispose of the property but it needed to go, 10-15 boxes of property in Roth's home, in which Fana owes Roth \$900.00, Roth will file in court if no response by 7-30-07, envelope addressed return to sender, unclaimed on envelope; Defendant's Exhibit # 4 – Letter from Roth to Melissa Napier dated 6-9-07, marked on envelope Not Deliverable as Addressed, Unable to Forward, in which letter states Roth sought agreement regarding money owed to her by Melissa Napier and Virgilio Fana, calls unanswered, has been over one (1) year since Roth loaned money to Melissa Napier and Virgilio Fana, Melissa Napier and Virgilio Fana owe Roth \$600.00, Roth has asked Virgilio to pick up the children's belongings, Virgilio Fana took twelve (12) boxes and stated he had no place to put the remainder of the property, asking Melissa Fana to reconsider and allow Roth to see the children.

The sole issue pending before this Court is whether Plaintiff has proved beyond a preponderance of the evidence in the trial record that Defendant failed to return Plaintiff's property and disposed of it unlawfully and is entitled to relief in the amount of \$3,756.00. For the reasons set forth below, the Court enters judgment in favor of the Defendant. Plaintiff's claim is therefore DENIED.

II. The Facts.

Plaintiff, Deborah Napier (hereinafter "Napier") is a resident of the State of Delaware. Defendant, Mary Roth (hereinafter "Roth") is also a resident of the State of Delaware.

At trial, Napier presented her case-in-chief and called as her first witness, Melissa Napier. Melissa Napier is the daughter of Napier. Melissa Napier testified that approximately at the end of March 2006, Roth received temporary guardianship of her four (4) children. The children resided with Roth until March 25, 2007. During the time between late March 2006 and March 25, 2007, Melissa Napier witnessed Napier bring items from her home to the Roth's home for the children. Melissa Napier also testified that Napier purchased items for the children while they were in the care of Roth. Roth informed both Melissa Napier and Napier that the children's' belongings needed to be marked for identification so that the belongings would be properly returned. Melissa Napier testified that Napier informed Roth that the items brought to Roth's home as well as the purchased items brought were to return to Napier and not remain with the children upon their departure from Roth's home. Melissa Napier stated that there were a lot of stuff brought to Roth's home, including dolls, clothing for all the children, toys for her youngest son and game systems that hook into the television, but did not know

everything that was brought to Roth's home for the children. Melissa Napier ceased visiting Roth's home but testified that she was informed that items were still being brought to Roth's home for the children, thus she did not witness the items that were brought during this time.

Rather, Melissa Napier testified that her husband informed her of the items that were being brought for the children to Roth's home. Melissa Napier stated that Napier received a letter from Roth in November 2007, which permitted Napier to retrieve the items since Melissa Napier had no right to the items any longer.

On cross-examination, Melissa Napier testified that she did not have custody of her children through August 2007 and received custody of her children October 10, 2007. She stated that Roth did not speak with her directly but wrote a letter to Napier regarding the retrieval of the children's' items. Melissa Napier testified that she was not present each time items were brought to Roth's home for the children but stated that she saw the items before they were brought to Roth's home. Melissa Napier testified that she sent a crib for the infant, which was purchased for an amount exceeding \$500.00 and denied telling Roth that the crib cost \$95.00.

On re-direct, Melissa Napier testified that she wrote a letter dated May 19, 2008, by the notary, addressed to "Whom It May Concern" giving authorization to Napier to retrieve the items at Roth's home, including the crib, a 27-inch TV/DVD player with VCR, two (2) potty seats and several DVDs.

On re-cross, Melissa Napier testified that the letter was dated May 19, 2008, a few months after the items were disposed of.

Napier called Virgilio Fana (hereinafter “Fana”) as her second witness. Fana is the father of the four (4) children who resided in the care of Roth for one (1) year. Fana testified that Roth had complained that Napier was bringing too many items to her home for the children such as clothing and toys. Fana informed Roth that the items were to return to Napier’s home, not his upon the children’s’ departure.

Fana testified that Roth called him and instructed him to write a letter to Napier in attempts to return the children’s’ items. Fana informed Roth that he did not know why he had to write such a letter to Napier. Fana testified that at the end of November 2007, he accompanied Melissa Napier and Napier to Roth’s home with a police officer in an effort to retrieve the items. Fana stated that he attempted more than one occasion to retrieve the children’s’ items from Roth’s home. Fana testified that he was informed by Patricia Keesey of a three (3) hour time frame on a Sunday in which to retrieve the items but was unable to retrieve the items on that day because he works on Sunday until 6pm.

On cross-examination, Fana testified that he was asked continuous times by Roth after the children had left Roth’s home to retrieve the items. Fana stated that he informed Roth that the items did not belong to him. Fana also testified that he told Roth that he had no time to retrieve the items not did he had any room to place the items. He also stated that he had informed Roth that he would be at her home to retrieve the items. Fana testified, over objection by Napier²³, that he was aware of a registered letter sent to him by Roth but that he never received it. Fana testified again that the items belonged to the children and that he in fact had custody of the children. Fana testified that he had a

² Napier objected to the admission of a registered letter sent to Fana by Roth on the grounds that she had not previously seen the letter nor did the letter concern her. The Court overruled Napier’s objection. The Court determined that Roth had laid the appropriate foundation for admission of the letter into evidence and Fana acknowledged that he received the letter.

³ See Defendant’s Exhibit 3.

conversation with Roth in August 2007, the next conversation after the previous one in June 2007, concerning legal paperwork relating to the children. Fana stated that Roth informed him that she had taken the legal paperwork to the Department of Family Services after the children had departed her home in March 2007.

Fana stated that he did show up with Melissa Napier and Napier accompanied by a police officer at Roth's home. He acknowledged that he did not notify Roth prior to showing up at her home. Fana testified that the afternoon in which he showed up at Roth's home, a police officer contacted Roth. Roth then telephoned Fana. Fana testified that when he asked Roth if he could come to her home that evening, Roth replied no. Fana stated that Roth told him that he could come to her home on the weekend to which Fana stated that he works on the weekend. Fana testified that Roth told him that she would be home all weekend and to arrive preferably in the afternoon to retrieve the items. Fana stated that in November 2007, after the children had departed Roth's home in March 2007, he told Roth that Napier could have the items and that he did not need to be present when Napier retrieved the items from Roth's home.

Napier called Grace Roth as her third witness. Grace Roth is the mother of Napier. Grace Roth testified that in April 2006 she was aware that her four (4) great-grandchildren went to live with Roth. She stated that she resided in Roth's home during this time for months and that she witnessed items brought by Napier to Roth's home for the children during that time, including clothes, Thomas the Tank Engine trains, a game system, stuffed animals and a bouncy chair for the baby. Grace Roth also testified that there were lots of things brought by Napier to Roth's home for the children and that she could not remember all of the items but does remember that there was a large quantity of

items. Grace Roth stated that she saw a letter in June 2007 that Roth sent to Napier after the children had departed Roth's home in March 2007. Grace Roth testified that the letter arrived shortly after Napier saw Roth at a parade in May 2007. Grace Roth stated that at the end of June 2007, she witnessed Napier telephone Roth to no avail.

She testified that Napier left a message for Roth inquiring as to when she could retrieve the items or make arrangements to retrieve the items. Grace Roth stated that Napier made the phone calls in her home to Roth. Grace Roth testified that she also witnessed a second phone call by Napier to Roth in July 2007 once again placed from her home. Grace Roth then stated that she was not aware if Napier received a telephone call back from Roth. Grace Roth testified that she wrote a letter⁴, which was notarized, stating that she had witnessed both phone calls by Napier to Roth.

On cross-examination, Grace Roth testified that she was present in Roth's home when the children departed in April 2006. She stated that she witnessed stacks of boxes in the hallway of Roth's home containing the children's' belongings. Grace Roth testified that she was present when the children departed Roth's home on March 25, 2006 and resided in Roth's home afterward. She recalled witnessing the boxes of the children's' belongings still in Roth's home almost a month after the children had departed Roth's home. Grace Roth testified that she witnessed Roth contact Fana but did not fully remember. She stated that the day after the children departed Roth's home, she witnessed Fana pick up twelve (12) boxes containing the children's' clothing. Grace Roth again testified that she witnessed two (2) telephone calls by Napier to Roth but did not know if Napier telephoned Roth's cell phone. She also stated that she did not hear an answering machine recording when Napier left messages for Roth. Grace Roth testified

⁴ See Plaintiff's Exhibit 5.

that on November 23, 2007, she did not recall if Napier asked Roth for the property or if Napier had threatened to take Roth to court regarding the property. She stated that in February 2008, Napier placed a call to Roth from home but to no answer.

Grace Roth further stated that she did not hear the answering machine recording and Napier in fact did telephone Roth's home, not her cell phone.

On re-direct, Grace Roth testified that Napier placed a telephone call to Roth from the home of Lorene Faulkner⁵.

On re-cross, Grace Roth testified that she heard Napier leave a message for Roth stating "Called to see if you actually got rid of the kids' belongings. That is what I have been informed. Call Pat to relay a message."

On re-direct, Grace Roth testified that she was aware on February 6, 2008, after Napier was informed the children's' items had been disposed of, that in fact the items were no longer in Roth's possession. She also stated that she witnessed Roth's granddaughter wearing her other great-grandchild's coat because she recognized the coat right away.

On re-cross, Grace Roth testified that she did not remember if the three (3) boys, Thomas, Tyler and Jericho had Spiderman coats or if both girls, Trinity and Zoey, had Dora the Explorer coats. She stated that she knew that her great-granddaughter had her other great-granddaughter's coat on but did not remember what coats the children had when they resided with Roth.

Deborah Napier then took the witness stand to testify. Napier and Roth are sisters. She stated that in April 2006, her four (4) grandchildren were placed in Roth's home. Over the course of time, Roth explained to Napier that she was experiencing

⁵ See Plaintiff's Exhibit 4.

difficulty in obtaining items for the children from the parents of the children, that she had asked the parents to bring items to her home for the children but to no avail.

Napier testified that she brought items from her home to Roth's home for the children and also purchased certain items for the children because Roth had accused Napier's grandchildren of breaking toys belonging to Roth's grandchildren. Napier stated that Roth informed her that if Napier were to bring items to her home that Roth would pack her grandchildren's' toys away. Napier testified that she brought numerous items for the children to Roth's home, including summer clothing, baby V-Smile, handheld Leapsters, school clothing, trains, tracks, movies, Rescue Hero vehicle, toy flashlights and baby clothing. Napier stated that Roth informed her to mark the items for identification so that the items would be returned to the rightful owner. Napier marked the items she brought to Roth's home with a N with a circle around it. Napier stated that she continued to bring items to Roth's home for the children through Christmas 2006 and in some instances, Roth was not present at the time. Napier testified that during a three (3) week interim, Roth was not present in the home and she and Grace Roth took care of the children, thus Roth did not witness every item brought to her home for the children. In December 2006, Napier was informed by Roth that she did feel that she would receive any assistance from the children's' parents in obtaining presents for the children for Christmas. Napier testified that Roth stated that the children have to have a Christmas to which Napier responded by bringing toys and clothing to Roth's home. Napier stated that Roth did return the children's' summer clothing and the remainder of the items remained in Roth's home with the children, including games with systems and coats⁶. Napier testified that she purchased two (2) coats for the children to which she has

⁶ See Plaintiff's Exhibit 7.

receipts. She stated that she spent a couple of thousand dollars in purchasing merchandise for the children.

Napier also testified that some items were personal in nature to her as they had belonged to the oldest grandchild and were passed down to future grandchildren, thus being of sentimental value to her. Napier stated that she spoke with Roth in May 2007 to which Roth asked Napier when boxes had been brought to her home after she delivered them to Fana. Napier testified that on May 27, 2007, while Roth was not home, she went to Roth's home and left the boxes. She then saw Roth on May 28, 2007, at a parade. Napier received a letter from Roth dated June 9, 2007⁷ that began "as per our conversation May 28, 2007". Napier testified that there was no mention in the letter of when she could retrieve the items from Roth's home and also no mention that the items were crowding Roth's home. Napier stated that she had receipts for the items that she personally brought from her home or purchased for the children⁸ which were categorized according to the length of time the children had the item, such as four to six (4-6) months for school clothing and Thomas the Tank Engine toys. Napier testified that some small boxes of clothing were received from Roth's home. She further stated that she knew what was returned because she personally put the clothing away during the time she was taking care of the children. Napier stated that she is not out to charge Roth for something that was returned. She also testified that there are many items that were not included in the list⁹ that she produced, in that they were small things. She further stated that she spent thousands of dollars and received nothing back. Napier testified that she sent a

⁷ See Plaintiff's Exhibit 1.

⁸ See Plaintiff's Exhibit 7.

⁹ See Plaintiff's Exhibit 7.

letter to Roth and also telephoned her. She further testified that in November she did state that if she had to take Roth to court that she would.

Napier stated that she received a letter dated October 19, 2007¹⁰ from Roth stating that the items needed to be removed from her home. Napier further testified that the envelope of the letter, sent certified mail, is dated November 23 or November 27. Due to receipt of the letter, Napier arrived at Roth's home escorted by a police officer to retrieve the items because Roth was going to throw the items away. Napier stated that Roth informed her that the items could not be retrieved prior to December 1 because Roth was attending or hosting a Christmas party and a delay in retrieving the items needed to occur for this reason. Napier testified that her daughter, Melissa Napier, had written a letter stating that Napier could retrieve the items and Napier arrived at Roth's home on three (3) separate occasions for this purpose. Napier stated that she arrived at Roth's home in May 2007 on two (2) occasions, June 2007, July 2007, November 2007 and February 2008 to retrieve the items. Napier testified that Roth stated that Napier's list of the children's' items¹¹ was exaggerated in value and Napier had no interest in the property. Napier further stated that Roth told her that she was not entitled to the property in addition to the fact that the clothing would no longer fit the children. Napier testified that Roth's Response to the Complaint is a reiteration of the letter and decision of the Justice of the Peace Court.

On cross-examination, Napier testified that she telephoned Roth in June and July 2007 and left messages on her answering machine at Roth's home. She stated that she called Roth's home in order to leave a message on the answering machine so that she

¹⁰ See Plaintiff's Exhibit 2.

¹¹ See Plaintiff's Exhibit 7.

would not have to speak with Roth. Napier stated that her and Roth have not spoken except for court proceedings.

Napier testified that she arrived at Roth's home on three (3) separate occasions in order to retrieve the items with no pre-arranged plans made with Roth. Napier stated that she was advised to arrive at Roth's home by a police officer after court proceedings had occurred that day in a different matter. Napier testified that she was informed to return later that day in the evening to Roth's home. Napier stated that Roth told Fana she would not be home that evening but Napier was advised by the police officer to return to Roth's home that evening. Napier testified that Roth informed her that too many items were being brought to her home for the children and that she would try to keep the items sorted. Napier stated that Roth informed her that she would attempt to keep the items separated and to place names on the items for identification purposes. Napier also stated that the grandchildren were sharing clothing because they were the same age. Napier testified that the infant had outgrown the crib by December 2006 and Roth had to borrow a crib for the infant. Napier stated that the children returned to the custody of Fana on March 23, 2007. Napier testified that she spoke with Maria Lincoln around Christmas 2007 and that Maria was supposed to telephone her in February 2008. In this encounter around the week after Christmas 2007, Maria informed Napier that she had spend all day on a particular Saturday at Roth's home because she believed that Napier would arrive to retrieve the items that day. Maria informed Napier that she would assist in removing the items from Roth's home and that the children are suffering in this matter because the items belong to them. Napier stated that she would contact Fana regarding the matter. Maria informed Napier that she would ask her daughter, Crystal to assist as well. Napier

then testified that she telephoned Maria again and was informed by Maria that she would see Roth the next weekend and Maria would inquire about the items.

Napier stated that she did not hear back from Maria. In February 2008, Maria informed Napier that the items had been disposed of to which Napier telephoned Roth to inquire if the items were in fact truly gone.

Roth presented her case-in-chief and called Patricia Keesey (hereinafter "Keesey") as her first witness. Roth proffered that Patricia Keesey is her sister who was a witness to the children's' property being packed up and also a witness to Roth attempting on several occasions to make arrangements for the property to be retrieved. Keesey testified that she was present in Roth's home on several occasions while the children resided with Roth. She stated that after the children had departed Roth's home, she visited the home as well. Keesey testified that during these visits to Roth's home, she witnessed stacks of boxes in the hallway of the home that remained there for quite a few months. She also stated that the boxes were still present in Roth's home at Christmas 2007. Keesey testified that she was asked by Roth to come to Roth's home on November 27, 2007 because Roth had telephoned Napier due to Fana being ambiguous about retrieving the property. Keesey stated that Roth was expecting Napier to arrive at her home that weekend to retrieve the property. Keesey stated that no one showed up at Roth's home that weekend to retrieve the property. Keesey testified that Napier son was asked to be available that weekend to assist with removing heavy items to which Keesey stated that he agreed.

On cross-examination, Keesey testified that Napier's son stated sometime in the fall, possibly September 2007 that he would be available to assist in the removal of the items.

Keesey stated that she was aware Napier's son was incarcerated from April 2007 until September 2007 but was unsure of the exact date he was released from incarceration. Keesey testified that she had contact with Napier in November or December 2007 after Roth attempted to contact Napier. Roth was unsuccessful in contacting Napier because the phone call was restricted. Roth asked Keesey to contact Napier to make arrangements to retrieve the items. Keesey testified that she did as such but did not instruct Napier as to a three (3) hour time frame between 9am – 12pm on a particular Sunday morning. Keesey stated that Roth indicated retrieval of the items was not to occur before a certain hour in the morning and after dark. Keesey testified that she was informed by Napier that Fana works on Sunday. Keesey further stated that Roth informed her that the weekend was the only time she would be available for retrieval of the property.

On re-direct, Keesey testified that Napier never returned contact with her and that Napier informed her that she never stated that she was unable to make arrangements for that particular weekend or any other weekend to retrieve the property. Keesey stated that she is able to verify that Roth's phone number is restricted.

Roth called Maria Lincoln (hereinafter "Lincoln") as her second witness. Roth proffered that Maria Lincoln is her daughter who had several conversations with Napier regarding the retrieval of the property. Lincoln testified that she was at Roth's home during the weekend around November 27, 2007 or sometime around Thanksgiving.

Lincoln was asked to be there by Roth so that no altercations would occur during the retrieval of the items and also assist in removing the items. Lincoln testified that Keesey was present at Roth's home as well and that no one arrived to retrieve the items.

Lincoln stated that she encountered Napier after Christmas 2007 at Wawa at which time she informed Napier that Napier needed to contact Roth regarding the retrieval of the property. Lincoln testified that some time after this encounter, she informed Napier that she did not want to be placed in the middle of the dispute. Lincoln testified that she informed Napier sometime in March or April 2008 that, upon inquiry from Napier, the property was gone from Roth's home.

On cross-examination, Lincoln reiterated that she encountered Napier at Wawa during the holiday period of 2007. Lincoln informed Napier that she had been at Roth's home previously and was under the impression that someone was to arrive to retrieve the property. Lincoln testified that she had seen Melissa Napier as well and informed her of the need to remove the property. Napier informed Lincoln that she had no knowledge that the items were to be retrieved during that particular weekend in November 2007 and that no arrangements had been made to retrieve the items. Lincoln stated that she would obtain her daughter's vehicle to assist in the removal of the property as well as the use of Fana's vehicle to remove the property in order to resolve the dispute. Lincoln further testified that she informed Napier that she volunteered to use her Jeep to assist in the removal of the property. Lincoln stated that Napier informed her that she would get back to her. Lincoln then informed Napier that she would see Roth that next weekend. Lincoln testified that when she spoke with Napier again the property had been disposed of.

Mary Roth then took the witness stand to testify. Roth stated that she obtained custody of the four (4) children around March or April 2006 and retained care of them for approximately one (1) year.

The children ranged in age from six (6) weeks to six (6) years of age. Roth further stated that the children departed from her home in March 2007. Roth testified that Napier did bring some items to her home for the children but disputes the quantity of the items. Roth stated that her and Napier reached an understanding after she informed Napier to not bring any more items for the children to her home. Roth testified that Fana received custody of the children after they departed her home. Roth stated that the night the children departed her home Fana removed twelve (12) boxes of the children's' clothing from her home and he stated that he had no room for the remaining items. Roth informed Fana to retrieve the remainder of the property when he did make room for it but months passed. Roth stated that she saw Fana weekly through June 2007 at one of the child's medical appointments and continually reminded him that the items needed to be removed from her home. Roth testified that Fana informed her that he had no time to retrieve the items or would state that he would arrive at her but never did. Roth stated that she sent a letter to Melissa Napier in an attempt to remove the property but the letter was returned undeliverable¹². Roth further stated that she sent a letter to Napier and received no response. Furthermore, Roth sent a letter to Fana¹³ to no avail and another letter to Napier¹⁴ with no success which stated that Napier needed to remove the two (2) items she had stored in Roth's garage and also that she could take the children's' property if she desired. Roth testified that she received a call from Napier in which there was no

¹² See Defendant's Exhibit 4.

¹³ See Defendant's Exhibit 3.

¹⁴ See Defendant's Exhibit 1.

discussion of making arrangements to retrieve the property. Roth further testified that she received no calls from Napier in June or July 2007. Roth acknowledged that she received calls from Napier in August 2007 and February 2008.

Roth testified that Grace Roth might be confused as to the phone calls she witnessed and the dates of such. Roth stated that she never spoke with Napier nor was contacted by Napier. Roth testified that she tried to make arrangements for the property to be removed by relating messages to her sister, Patricia Keesey whom resides next door to Napier. Roth stated that after a court proceeding with Fana, she received a call from a police officer stating that people were at her home, which was verified by Roth's neighbor. Roth surmised that it was Napier and Melissa Napier at her home to which she stated that she was unaware they were arriving at her home. Roth stated that the police officer informed her of the need to resolve the situation. Roth then spoke with Fana and he informed her that he would arrive at her home later that evening to which Roth informed her that she would be working. She further stated to Fana that the weekend would be the best time to retrieve the property but he relayed to her that he was unsure if that time would be appropriate. Roth testified that she contacted Keesey and Lincoln and asked them to be present in her home on that particular weekend in the event the items would be removed but no one arrived. Roth testified that she went to New Castle County Police Department and notified an employee that she wished people, escorted by the police, would not continue to arrive at her home. She further stated that she asked the employee to place a note in the file stating that Roth should be contacted before people, with a police escort, arrive at her home again. Roth stated that she had no further communication with Napier and was served with court papers.

On cross-examination, Roth stated that she did sent a letter to Napier¹⁵ which indicated that her and Napier had spoken on May 28, 2007 but that conversation did not include the removal of the property due to the children being present at that time.

Roth reiterated that she spoke with Fana on several occasions regarding the removal of the property. Roth stated that she contacted Fana in August 2007, not Napier. Roth testified that her phone number is restricted and that Napier and her mother, Grace Roth share the same telephone number. Roth stated that her cell phone number is not restricted and Napier never contacted Roth on her cell phone. Roth further testified that she could have telephoned Napier using her cell phone but did not believe it was her responsibility to continue to attempt to make arrangements for retrieval of the property since she believed that she had sufficiently attempted to already.

III. Discussion.

(A) Plaintiff's Contentions.

Plaintiff argues that this matter is not just about property or the reimbursement for property but rather this matter is about four (4) innocent children who had their belongings ripped away from them. Plaintiff asserts that it was her property that she owned and/or purchased for the children and it should have been returned to her. Plaintiff contends that Roth claimed to have loved the children but yet disposed of their property. Plaintiff argues that Roth did not make any attempt to return the property to her. Plaintiff asserts that she made attempts to retrieve the property from Roth. Plaintiff states that the children never received some of the property and this dispute is not fair to the children.

¹⁵ See Plaintiff's Exhibit 1.

Plaintiff argues that the property belonged to the children and should have been returned to them, including but not limited to, learning items that were given to make the children feel comfortable in the situation they had to be in.

(B) Defendant's Contentions.

Defendant argues that the instant matter is not about the children but rather about money. Defendant asserts that she loves the children and they love her but she is not permitted to see the children to this day. Defendant argues that she attempted to return the property and that almost one (1) year had elapsed since the children departed her home that she disposed of the property. Defendant states that the property was consuming the spare bedroom of her home, which she needed to utilize. Defendant argues that no one took control of the property. Defendant asserts that she was unclear as to how long she was expected to retain the property and that she did the best that she could.

IV. The Law.

The Complaint filed in this action alleges, *inter alia*, that Roth had possession of personal property belonging to Napier from April 2006 to March 2007 that was brought to Roth's home for the care of Napier's four (4) grandchildren. The Complaint also alleges, *inter alia*, that when the children were no longer in the care of Roth, Roth failed to return the personal property of Napier to her as requested.

The Answer to the Complaint in this action alleges, *inter alia*, that Napier did bring items for the children to Roth's home while the children resided in Roth's care; however, the owner of the property failed to retrieve the property from Roth's home in a timely manner after Roth made several unsuccessful attempts to contact the owner of the

property and make arrangements for the property to be retrieved. The Answer to the Complaint also alleges that Napier has no legal standing regarding the children and as such their property.

Plaintiff must prove the underlying action by a preponderance of the evidence. See e.g., *Orsini Top Soil and Frank Orsini v. Kenneth T. Carter and Lisa Carter*, 2004 Del. C.P. Lexis 10, (April 17, 2007 Welch J.).

The Court in *Paul v. Sturevant*, 2006 WL 1476888 at *1-*2 (Del. Com. Pl.) articulated the law of replevin. The Court stated:

Replevin is primarily a form of action for the recovery of possession of personal property which has been taken or withheld from the owner unlawfully. *Harlan and Hollingsworth Corp. v. McBride*, 69 A.2d 9, 11 (Del. 1949). While the right asserted in replevin is on its face a right to possession, nevertheless, it has become over the years a useful method to determine the title to goods and chattels. *In re Markel*, 254 A.2d 236, 239 (Del. 1969)(citations omitted). Replevin has also been considered as a means of trying title to the property involved and an appropriate form of action in which to determine which of two contending parties is the owner. 77 C.J.S. *Replevin* Sec. 5 (1994). Replevin can also be maintained by a plaintiff who does not hold the legal title to the property. *Willey v. Wiltbank*, 567 A.2d 424 (Del. 1989). Replevin may be brought to recover any specific property unlawfully detained from the owner thereof. 77 C.J.S. *Replevin* Sec. 10 (1994).

In *Gianakis v. Koss*, 2003 WL 21481014 (Del. Super.), the Superior Court of Delaware stated the law of replevin. The Court stated “Replevin is a form of action for the recovery of the possession of personal property which has been taken or withheld from the owner unlawfully.” *Gianakis v. Koss*, 2003 WL 21481014 at *1 (Del. Super.) citing to *In the Matter of: Michael J. Richardson*, 2000 WL 1162291 (Del. Super.)(citing *Harlan and Hollingsworth Corporation v. McBride, et. al.*, 69 A.2d 9 (Del. Supr. 1949);

Bennett v. Brittingham, 3 W.W. Harr. 519, 33 Del. 519; *McClemy v. Brown* 6 Boyce 253, 99A. 48; 2 *Woolley's Delaware Practice*, §§ 1526, 1528, 1541, 1555).

The Court further stated “In order to obtain relief, Plaintiffs must establish that they have a right to the immediate and exclusive possession of the item in controversy.” *Gianakis v. Koss*, 2003 WL 21481014 at *1 (Del. Super.) citing *In the Matter of: Michael J. Richardson*, 2000 WL 1162291 (Del. Super.)(citing 2 *Woolley*, § 1541).

“If Plaintiffs do not have the right to the immediate possession of the item, Plaintiffs cannot maintain replevin.” *Gianakis v. Koss*, 2003 WL 21481014 at *1 (Del. Super.) citing to *In the Matter of: Michael J. Richardson*, 2000 WL 1162291 (Del. Super.)(citing 2 *Woolley*, § 1524).

The Court in *Sammons & Sammons v. Jones*, 1999 WL 1847367 (Del. Com. Pl.) articulated the standard to be met for a replevin action. The Court stated, “Since replevin is a possession action, the party seeking to recover the property must establish the right to immediate and exclusive possession.” *Sammons & Sammons v. Jones*, 1999 WL 1847367 at *1 (Del. Com. Pl.) citing to *JLJ Enter., Inc. v. Keyek*, Del. Super., 1992 WL 148093, Civ. A. No. 92C-04-013 (June 5, 1992)(Graves, J.)(citations omitted).

“The moving party must establish by a preponderance of the evidence that he or she has a clear and unequivocal right to the item sought.” *Sammons & Sammons v. Jones*, 1999 WL 1847367 at *1 (Del. Com. Pl.) citing to *Frick v. Miller*, Del. Super., 107 A.2d 391, 393 (1918). Furthermore, the Court in *WSFS v. Chillibilly's Inc.*, 2005 WL 730060 at *4 (Del. Super.) stated, “In order to maintain a claim of replevin, a party must demonstrate that it has title and the right to immediate possession of the property at issue.” *WSFS v. Chillibilly's Inc.*, 2005 WL 730060 at *4 (Del. Super.) citing to *Harlan*

& Hollingsworth v. McBride, 69 A.2d 9, 11 (Del. 1949). “A successful replevin action will result in the return of the specified property or, in the alternative, the proceeds or value derived from the sale or disposition of the property.” *WSFS v. Chillibilly’s Inc.*, 2005 WL 730060 at *4 (Del. Super.) citing to *Allstate Ins. Co. v. Rossi Auto Body, Inc.*, 787 A.2d 742, 745 (Del. Super. 2000).

The Court in *Frick v. Miller*, 7 Boyce 366, 107 A.391 (Del. Super. 1918) articulated the law of replevin. The Court stated:

The primary object of the action is the recovery of the property itself with damages for the taking and detention thereof. Secondly, and usually, the object is the recovery of a sum of money equivalent to the value of the property claimed if the defendant cannot or will not surrender possession.

Frick v. Miller, 7 Boyce 366, 107 A.391 at 393 (Del. Super. 1918) citing to *McClemy v. Brown*, 6 Boyce, 253, 99 Atl. 48; *Harlan & Hollingsworth Corporation v. McBride et al.*, 6 Terry 85, 45 Del. 85, 69 A.2d 9 at *11 (Del. 1949) citing to *Bennett v. Brittingham*, 3 W.W. Harr. 519, 33 Del. 519; *McClemy v. Brown*, 6 Boyce 253, 99 A.48; *Pritchard’s Admr. v. Culver*, 2 Har. 129; 2 Woolley’s Del. Pr. §§ 1555, 1556.

The *Frick* Court further stated:

The action is a possessory one and lies only to one entitled to possession at the time of the commencement of the action. The right to possession of the goods replevied must be coupled with ownership either general or special. The wrongful detention from the plaintiff by the defendant of the goods and chattels replevied at the time they were replevied is a material fact for the plaintiff to prove to maintain the action of replevin.

Frick v. Miller, 7 Boyce 366, 107 A.391 at 393 (Del. Super. 1918).

This Court addressed the action of replevin in *Stickney v. Goldstein*, 2002 WL 31999358 at *10-*11 (Del. Com. Pl.). The Court stated:

The law of conversion provides, *inter alia*, that “... conversion in the broad sense consists of an act of willful interference with any chattel without lawful justification, where any person entitled thereto is deprived of the possession of it”. Salmond Torts, 8th Ed., 314 *Vandike v. Pennsylvania R.R. Co.*, Del.Supr., 86 A.2d 346 (1952).

As set forth in *International Business Machines Corp. v. Comdisco, Inc.*, 1993 Del.Super., LEXIS 183, 1993 WL 259102 Goldstein, J. (June 30, 1993), the law of conversion has been defined as follows:

The modern action for tort of conversion always has been colored by its dissent from the ancient common law form of action of Trevor, which originated as a remedy against the finder of lost goods who refused to return them. Until comparatively recently, the fiction of losing in finding persisted in the pleading of the action. However, the basis of the tort was considered to be an interference with possession of a chattel, or with right to immediate possession. See, *General Motors Corp. v. Douglass*, Ill.App., 206 3rd 881, 206 Ill.App.3d 881, 151 Ill.Dec. 822, 565 N.E.2d 93 (1990) (citations omitted) (citing *Restatements Second of Torts*, Sec. 242, Com. Sec. 222A, camt. A (1965)). As set forth in *International Business Machines Corp.*, “A complaint for a conversion must allege plaintiff’s right in the property and to immediate possession; a demand by plaintiff for possession” and unauthorized assumption of control or ownership by the defendant over the property of the plaintiff. *Catz v. Belmont National Bank*, Ill.Supr., 122 Ill.2d 64, 96 Ill.Dec. 697, 491 N.E.2d 1157 (1986). “However, this old common rule does not apply where ‘wherein [the] independent act of conversion’ is alleged.” See, *International Business Machines Corp.* at 8.

Conversion is always an intentional exercise of dominion or control over the chattel. Mere Non-Feasence or negligence, without such an intent, is

not sufficient for a conversion. If the actor has the intent to do the act exercising dominion or control, however, he is not relieved from liability by his mistaken belief that he has possession of the chattel or the right to possession or that he is privileged to act. *International Business Machines Corp., supra*; *Restatement Second of Torts*, Sec. 223, cmt. B “The essence of conversion is a wrongful deprivation of one who has a right to immediate possession of the object unlawfully held.” *Bender v. Consolidated Mink Ranch, Inc.*, Ill.App., 110 Ill.App., 3207, 65 Ill.Dec. 801, 441 N.E.2d 1315 (1982); *International Business Machines Corp., supra*.

V. Opinion and Order

Based upon the totality of evidence received into the record at trial including the oral testimony of all witnesses and exhibits entered by both parties, this Court finds that the plaintiff has not proven beyond a preponderance of the evidence that she is entitled to prevail in this replevin action.

Applying relevant case law in the area of replevin in this jurisdiction, the Court finds that Napier did not have a right to the property, as Napier gifted the property to the children. Furthermore, Napier was not entitled to immediate possession of the property, as the property belonged to the children. Napier admitted that the property belonged to the children. Title to the property passed to the children once Napier either brought or purchased items for the children. The title to the property remains in the children or their custodial parents/legal guardians of which Napier is neither.

The plaintiff in this action, at the time it was brought, did not own or have such a property in the goods replevied or any portion of them as to entitle her to their immediate possession.

The property that Napier brought to Roth's home for the children as well as Napier's right to that property was forfeited when Napier failed to make reasonable efforts to retrieve them in a timely manner. Under the evidence in this case, the four (4) children and their custodial parents had such property in the goods replevied either by purchase or by gift as would entitle them to the possession of the goods in question. Napier does not now have a superior possessory right to the property although she may have purchased items for the children. Although Melissa Napier designated permission to Napier to retrieve the belongings, that letter is dated by the notary May 19, 2008, well after the time the property had been disposed of and well after the time Napier had been notified by Roth via letter that the property, if not retrieved, would be disposed of December 1, 2007, so thus Napier did not serve as Melissa Napier's personal representative entitled to the possession of the property.

Napier had to prove that Roth had custody of the items and refused to surrender possession of the property. The evidence in the trial record indicates that Roth made several attempts to make arrangements for the return of the property with Virgilio Fana, the custodial parent of the children, Melissa Napier, the mother of the children and Napier herself. All of Roth's attempts to make arrangements to return the property were unsuccessful. Roth retained the property for approximately one (1) year. During that time, Napier arrived at Roth's home escorted by police officers in attempts to retrieve the property, without making prior arrangements for Roth to be home at that time. Napier testified that she chose to telephone Roth's home and leave a message on the answering machine so that she would not have to speak with Roth.

Plaintiff simply failed to make appropriate, reasonable arrangements with Roth to retrieve the property. Plaintiff thus forfeited the right to the return of the property after almost one (1) year had elapsed. Furthermore, there is not a scintilla of evidence to suggest that Roth attempted to destroy the property or evade Napier, Melissa Napier, or Virgilio Fana. Roth did what any reasonable person in her situation would have done. She attempted numerous times to arrange for the return of the property and after her attempts were unsuccessful almost one (1) year later, she disposed of the property. The Court therefore finds that Napier was not the custodian of the children nor the property and though she was given permission by Melissa Napier and Virgilio Fana to retrieve the property on their behalf, no reasonable efforts were made to retrieve the property in a timely fashion.

Plaintiff's own exhibit ¹⁶ submitted into evidence is a letter dated October 19, 2007 from Roth to Napier in which it states that Napier's property (two items of Napier's stored in Roth's garage) needed to be removed. Also in the letter it states that since Virgilio Fana and Melissa Napier have never responded to Roth's requests to retrieve the property, Napier can have what she wants of the property and if the property is not retrieved, it will be disposed of December 1, 2007. The return receipt label on the envelope is missing. Even assuming that Napier received the letter as dated on the envelope November 23, 2007 or November 27, 2007, it still afforded Napier time to retrieve the property prior to December 1, 2007. In February 2008, after having been notified by Roth a few months prior, Napier telephoned Roth to inquire about the property.

¹⁶ See Plaintiff's Exhibit # 2.

Plaintiff's exhibit of a telephone bill with a telephone number circled dated February 6, 2008, alleged to have been made to Roth,¹⁷ does not prove that the number does in fact belong to Roth. Furthermore, Plaintiff's exhibit indicating that Grace Roth had overheard the telephone calls Napier made to Roth¹⁸ is a notarized yet undated affidavit. A notarized letter from Melissa Napier, dated May 19, 2008 by the notary, giving authority to Napier to retrieve the children's property from Roth's home and ownership of the property to Napier does not support the argument that Napier had title to the property. Finally, Virgilio Fana in his testimony acknowledged the existence of a letter dated July 16, 2007 to him from Roth requesting that Fana retrieve the property. Though the envelope on the letter indicates the mail was undeliverable, Fana acknowledged the existence of the letter, showing Roth attempted to return the property. Roth also attempted to make contact with Melissa Napier regarding the return of the property in a letter dated June 9, 2007 to no avail. It is clear from the evidence in the trial record that Roth made several attempts to return the property.

Napier was unable to prove that she was deprived of property to which she was entitled and also unable to prove that Roth is responsible for the loss. Plaintiff's Exhibit of a listing of the property and accompanying receipts¹⁹ is mostly indiscernible as many items on the receipts are unable to be read from what appears to be highlighting on the receipts. Although Napier did not hold legal title to the property, she may have retrieved the property from Roth though for her delay in the retrieval of the property. The evidence in the trial record does not indicate that Virgilio Fana, Melissa Napier, nor Napier made any demands for possession of the property, until much too late. Roth

¹⁷ See Plaintiff's Exhibit # 4.

¹⁸ See Plaintiff's Exhibit # 5.

¹⁹ See Plaintiff's Exhibit # 7.

attempted to contact Fana, the children's father to no avail, then Melissa Napier, the children's mother to no avail and lastly, the children's grandmother, Napier to no avail regarding the retrieval of the property. None of Roth's attempts were successful. Furthermore, Roth did not possess unauthorized control over the property. The property was brought to Roth's home for the children while under the care of her. Roth did not unlawfully hold the property during the time the children resided with her nor after the children had departed her home. In effect, Roth retained the property in attempts to return it to the owner; however, after almost one (1) year had lapsed in which the owner of the property had not claimed it, Roth considered the property forfeited and disposed of it. In this action, the facts fail to establish plaintiff's clear and unequivocal right to the property. Plaintiff has failed to prove, by a preponderance of the evidence, that she is entitled to the value of the property.

Based on the foregoing facts and analysis discussed *supra*, the Court finds that the record is insufficient to support Plaintiff's Replevin action against Defendant. The action is simply not supported by a preponderance of the evidence.

Thus, the Court enters judgment in favor of the Defendant and finds no liability against the Defendant. Each party shall bear their own costs.

IT IS SO ORDERED this 14th day of July, 2009.

John K. Welch
Judge

/jb

cc: Ms. LuAnn Smith, Court Clerk
CCP, Civil Division